IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1923
No. 142

JOHN SWENDIG, JAMES W. MILLER, REMIGUS GRAB and ANTHONY KERR,

Appellants,

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation,

Appellee.

BRIEF OF APPELLEE

JOHN P. GRAY,
FRANK T. POST,
Counsel for Appellees

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STATEMENT OF FACTS

The Washington Water Power Company is engaged in the generation and distribution of electricity in the States of Idaho and Washington.

Prior to the 7th of July, 1907, the power company filed an application with the Department of the Interior for a permit for a right of way across the Coeur d'Alene Indian Reservation in Idaho for the construction and maintenance of an electric power transmission line. The application was made under

the provisions of the Act of February 15, 1901 (31 Stats. at Large, 790) which act is as follows:

> "That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber, or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: Provided, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest; Provided further, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of Title sixty-five of the Re-

> vised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: And provided further, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

On July 7, 1902, the permit so applied for was granted by the Secretary of the Interior. At the time the permit was given, the lands over which the right of way was sought were a part of the Coeur d'Alene Indian reservation, unsurveyed and not open to settlement.

At about the same time the power company filed application with the Department of the Interior for authority to construct a telephone line over and across the Indian reservation under and pursuant to Section 3 of the Act of Congress approved March 3, 1901, entitled, "An act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes."

Under that application the Secretary of the Interior granted the appellee the right to survey, locate, and maintain the telephone line desired upon the payment of damages and compensation assessed under his direction, amounting to $224, which sum was paid by the

appellee into the office of the Commissioner of Indian Affairs.

Pursuant to the permit, the Washington Water Power constructed over and across the reservation and along the right of way designated, a high tension electric power transmission line extending from Spokane, Washington, to Burke, Idaho, in the Coeur d'Alene Mining District, which line has ever since August, 1903, been used for the purpose of supplying electric power and energy to that mining district.

The telephone line was constructed upon the same poles as the electric power transmission line, and is used in connection with and as incidental to the power transmission line.

For the purpose of constructing and maintaining the lines mentioned, a patrol road was built by the appellee during the years 1902 and 1903, along which the patrolmen of the water power company passed in patroling the line and keeping the same in repair and available for use.

Subsequently and in the year 1906, Congress passed an act making provision for the allotment of lands to the members of the Coeur d'Alene Tribe of Indians within the reservation and the subsequent opening of the reservation to settlement. (Act of June 21, 1906, 34 Stat. at Large, 335).

Later in the year 1910, the appellants made homestead filings on lands in the reservation over which the

power and transmission lines had been constructed, and subsequently made entry and received patents for said respective tracts of land.

Thereafter, the appellants denied any right on the part of the power company to operate or maintain either of said lines and interfered with the exercise of those claims of right. Four separate actions were brought by the appellee against the appellants seeking injunctions restraining them from interfering with the asserted rights of appellee and to establish by decree that the permit for the power line and the easement for the telephone line continued in full force and effect. At the trial, the four cases were consolidated and the issues practically reduced to one, which was and is whether the patents issued to the appellants revoked and cancelled the permit and easement theretofore granted by the Secretary of the Interior to the appellee.

The Circuit Court of Appeals in its opinion finds the facts as above stated. The opinion also refers to the fact that each of the appellants admitted that the water power company's plant had been constructed and was in use at the time when he first settled upon the land claimed by him. (Opinion Court of Appeals, Fols. 83 to 87).

In addition to the facts so expressly found, the following facts appeared without contradiction:

The official plats of the two townships (Pltfs' Exhibits 1 and 2) within which the lands of appellants lie, show that at the time of the survey the power line had been constructed across said townships. It was further proved that the power line was constructed along the right of way granted by the Secretary of the Interior and that the patrol road and power line are in the same place where they were built in the years 1902 and 1903. The testimony further showed the necessity for patrolling the line and the need of a patrol road along the same.

JURISDICTION

Jurisdiction was based upon the ground that the suits involved the construction and application of the acts heretofore referred to.

The jurisdictional value was alleged, shown and not controverted.

DECREE OF THE DISTRICT COURT

The District Court entered a decree sustaining the rights of the power company in substance as follows:

(1) That the permit granted by the Secretary of the Interior under the act of February 15, 1901, for the electric power transmission line is a valid and subsisting permit and in full force and effect and that the Washington Water Power Company is in possession of the right of way and of the power transmission line constructed over and across the same;

(2) That the Washington Water Power Company is the owner of a right of way easement for a telephone line over the identical right of way for the electric power transmission line and that the telephone line as now constructed is incidental to the use of the power transmission line and said right of way easement is now in full force and effect;

(3) That the plaintiff is entitled to maintain along the transmission line and telephone line a roadway which must be within 50 feet of the center of said line as now constructed and the agents, servants and employes of the Water Power Company are entitled to go along the same at all times and keep and maintain the roadway for such purpose;

(4) That the plaintiff is further entitled in making repairs or renewals to the use of such land within 50 feet of the center of said line as may be necessary therefor;

(5) That the title of the defendants is subject to the foregoing rights of the Water Power Company.

It was further decreed that if any of the defendants (appellants) maintains any fence or fences on, around or across the lands he must provide gates therein for the plaintiff's use of sufficient width for the passage of ordinary vehicles at the places where the roadway passed through such fences, and the

Water Power Company should furnish locks and keep the gates locked.

The court further enjoined the defendants (appellants) from interfering with the plaintiff in the maintenance and operation of said power line, telephone line and patrol road, or in making repairs or renewals.

It was decreed that the rights of the plaintiff (appellee) should be limited to the strip of land 50 feet on each side of the electric power transmission line and that subject to the plaintiff's (appellee's) reasonable needs, the defendants (appellants) should have the right to occupy and use the strip of land and the Water Power Company and its employes, in going along said road, should use reasonable care to do no more injury to the defendants' growing crops than may be reasonably necessary, and must keep within 50 feet of the center line and in a roadway on one side or the other thereof, except as may be necessary in passing from the road to the poles or line, and that in making repairs or renewals reasonable care should be exercised not to do unnecessary damage to crops growing along the line. (R. pp. 34-37).

From that decree an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit which affirmed the District Court, and from the decree of the Circuit Court of Appeals, this appeal has been prosecuted.

ARGUMENT.

In compliance with the acts above mentioned, appellee received a permit to construct a power line and an easement along the same right of way to construct a telephone line. At the time these rights were granted, the lands were unsurveyed lands within an Indian reservation.

After receiving the permit, the appellee expended a large sum of money in the construction of its power line from Spokane, Washington, to the Coeur d'Alene Mining District, a total distance of over 100 miles, the section of the line across the Indian reservation being only a part of the entire transmission line, but, of course, its existence is essential to the maintenance of service upon the entire line.

Notwithstanding the large investment in the construction of this line; that it served an important public use and was intended to serve such public use when the permit was granted and the line constructed, it is the contention of appellants that the subsequent survey of the land and the issuance of patent therefor by the United States in itself revoked the permit to construct and maintain the electric power transmission line.

Appellants urge that the grant of a right of way for the transmission line to the appellee was a mere license; that the permit was a mere permissive, temporary occupation of the land and that the issuance of the patent to the legal subdivisions across which it was construct-

ed instantly worked its revocation. In other words, that the principle of private property law which applies to the granting of a personal license should be applied in construing the rights acquired under the statutes in question.

CONSTRUCTION OF ACT BY COURTS.

The Circuit Court of Appeals in its opinion clearly distinguished between such a mere personal license and the rights conferred upon appellee by the United States in pursuance of the statutes here involved. That court calls attention to the fact that if the grants were mere licenses, then the rights acquired could not be transferred or alienated by the power company. The court said:

> "It would hardly be contended that the appellee could not have at any time transferred or conveyed its power and telephone lines, with all incidental rights pertaining thereto, to some other company or person, or that its rights in the premises would not have passed to its creditors in the event it had been unsuccessful in its business." (R. p. 42).

The precise question presented in this case was once before decided by the District Court of the District of Idaho in a case which involved the same power and transmission lines over another tract of land.

> *Washington Water Power Co. v. Harbaugh,* 253 *Fed.* 681.

Judge Deitrich in the opinion in that case fully discussed the law and the decisions of the Interior Department construing it, and adopted the view that the issuance of a patent to the subdivisions across which the

power line had been constructed did not revoke the appellee's permit for a right of way. The views which he expressed in that opinion were followed in the present case. In his opinion in the Harbaugh case, Judge Dietrich referred to and approved the construction of the statute by the Secretary of the Interior, to which we now refer.

CONSTRUCTION OF THE ACT BY THE INTERIOR DEPARTMENT.

The decisions of the courts below in this case are in harmony with the construction which has been given to the Act of February 15, 1901, by the Secretary of the Interior. Under date of August 23, 1912, the Secretary of the Interior in a communication addressed to the Commissioner of the General Land Office, carefully considered and construed the statute involved in so far as it applies to questions such as are presented in this case. In the course of that opinion, the Secretary said:

> "In view of the permanent character of the works authorized to be constructed under the act of February 15, 1901, and the large investment necessary to such construction the statute ought not to be interpreted as giving a precarious tenure except in so far as clearly appears from the words used by Congress. After careful consideration of the matter I am of the opinion that the intent of Congress was to protect the public by retaining in the hands of the Secretary of the Interior full control over water-power development through the device of making permits revocable in his discretion. The statute authorized, in more generous and comprehensive terms than had been used in

any preceding statute, the development of water for domestic and public supply, irrigation, mining, and power, and also the development and transmission of electricity. Its primary purpose was to encourage development under unquestioned public control. The former regulation, which provided that—

> the final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission, so far as it affects that tract—

was directly contrary to the purpose of the statute as above interpreted. It discouraged development by making the title of the permittee subject, to that of the final patentee of the land occupied under the permit, and it abandoned all attempt at public control as soon as the land was finally disposed of.

To effectuate the purpose of the statute it is necessary that a permit once given should be superior to the rights of the subsequent patentee of the land until such time as the permit is duly revoked by the Secretary of the Interior in the exercise of the express authority given by the statute.

The contrary view, which was expressed in the provision of paragraph 43, above quoted, rests on a misleading analogy between these statutory permits and a license not coupled with an interest given by a private landowner to a stranger. But the rule of private real property law under which such a license is revoked by the transfer of the fee simple title has no application to either the legal or the economic data with which Congress was dealing in this legislation, and therefore the intent to enact the said rule should not be imputed to Congress in the absence of clear implication of such intent. It is, of course, unquestionable that it was entirely within the power of Congress to

provide a different rule if in its judgment under the circumstances the public welfare required it."

The communication and opinion of the Secretary above referred to is for convenience incorporated in this brief as Appendix I.

The administration of the Act of February 15, 1901, in so far as it affects permits granted within forest reserves is under the supervision of the Department of Agriculture. As Secretary Fisher points out in his letter of August 23, 1912, the Department of Agriculture had never taken the view that the disposal by the United States of any tract traversed by a right of way under the act revoked the permit.

The construction given by Secretary Fisher in 1912, is the settled construction of the statute by the Department of the Interior. That view has never been changed.

It is maintained by counsel for appellant that a decision of the Secretary of the Interior in the case of

Nye v. Washington Water Power Co.,

dated April 28, 1921, overruled the previous construction of the Act of February 15, 1901, by the department.

Involved in the Nye case was a permit to overflow certain lands within the Coeur d'Alene Indian reservation for reservoir purposes. The Secretary of the Interior, for reasons which he considered equitable and there set out, revoked that permit in so far as Nye

and certain other entrymen were concerned, leaving it in force as to other entrymen.

It is urged here and was urged upon the courts below that because of that decision that where patents issued upon homestead filings made prior to August 23, 1912, such patent revoked the permit.

It is clear that the opinion in the Nye case does not so hold and does not modify the conclusions of the department as set forth by Secretary Fisher. If such a view was taken, the decision in the Nye case would be inconsistent in itself. It would indicate a discrimination between two classes of settlers. By that decision, the Secretary of the Interior revoked the permit as to certain entries which were made prior to August 3, 1912, and declined to revoke it as to other entries made prior thereto. In reading the decision, it will be clear that the Secretary was exercising a discretion in favor of certain settlers who made an equitable appeal to him and against others.

Either the permit is valid as a matter of law and subsisting or it was terminated by the issuance of the patent. Both the courts below have held that it is valid and subsisting.

The construction of statutes by executive departments charged with the duty of administering them should not be overruled without cogent reasons and the settled construction of such statutes by the officers of one of the great executive departments of the govern-

ment should not be overruled unless it is clearly erroneous.

United States v. Moore, 95 U. S. 760
Heath v. Wallace, 138 U. S. 573.

With reference to the revocation of a permit under the statute, the Circuit Court of Appeals in this case reached the same conclusion as Secretary Fisher in his construction of the statute. In the course of its opinion, the Court of Appeals says:

> "The permission granted to the appellee was subject to revocation at any time by the then Secretary of the Interior or his successor; but that was the sole condition to the continuous existence of the rights of way granted, and that reserved power on the part of the grantor was never exercised prior to the issuance of the patents to the appellants, nor since, so far as appears. Whether the rights of way could be revoked by the present or any other successor of the then Secretary is not for consideration in the present case." (Trans. Fol. 87).

OBJECT OF ACT OF FEBRUARY 15, 1901.

The object of the Act of February 15, 1901, was to foster the development of the resources of the country by the generation and distribution of electric power and the promotion of irrigation, mining, manufacturing and other beneficial and legitimate commercial enterprises. Manifestly, it was not intended by Congress that when a permit had been granted by the Secretary of the Interior under the act such permit should be revoked except when there was a just and substantial

reason for such action. The act contemplates the construction of permanent works and plants. Congress was aware of the fact that such works and plants could not be constructed without the investment of very large sums of money. Clearly, it must have been the intent of Congress to give a tenure and right which would tend to effectuate the purposes of the act.

It is reasonable to believe it was the intention of Congress that when a permit was issued for such a right of way and a large investment made that the subsequent patenting of the legal subdivisions over which such a right of way extended did not result in a revocation of the permit. Had any such intention been expressed in the act it is evident that no such large investments would ever have been made. The act was intended to encourage development and not make it hazardous.

There is nothing in the statute which indicates an intention that the permit should be revoked by the subsequent patenting of the lands to a settler, and such a construction would tend not to effectuate the purpose of Congress in enacting the statute, but would tend to retard and prevent the very development which Congress sought to encourage. It is much more reasonable to believe that the power of revocation was retained in the Department in order that certain governmental control might be exercised for the public good in harmony with the growing sentiment that some such

control should be retained in the hands of the United States.

There is nothing at all to indicate that the Secretary of the Interior has ever in the exercise of his discretion or at all revoked or intended to revoke the permit of the appellee. The Court of Appeals so holds. Until the permit is revoked in the manner provided in the statute, the appellee has the right to maintain and operate its power line.

THE FORM OF PATENT.

The patents of appellants were issued subsequent to the decision of the Secretary of the Interior of August 23, 1912 and the regulations promulgated thereunder, but their patents did not expressly except the right of way for the power transmission line and the telephone line. In its opinion, the Circuit Court of Appeals refers to this and says:

> "It is conceded—or seems to be conceded, by counsel for the appellants, that had the patents in terms excepted the permits that had been theretofore granted by the Secretary of the Interior in pursuance of the act of Congress that has been referred to, the previously existing rights of the appellee would not have been affected." (Trans. Fol. 87).

Judge Dietrich in the Harbaugh case, supra, referring to the same fact, said:

> "The record does not purport to furnish any explanation for this omission, but in view of the other express provisions of the regulations, it

> cannot be held that the silence of the patent in this respect imports an intent on the part of the Secretary of the Interior to revoke the license. It is much more reasonable to assume that the absence of the notation is the result of inadvertence or carelessness on the part of some subordinate officer or employe, and neither the right of the plaintiff to use such right of way nor of the Government to control it could be divested by a mere clerical omission."

The issuance of a patent is a mere ministerial act, and if it be issued for lands reserved from sale by law it is void.

Stoddard v. Chambers, 2 Howard, 284.

That the patent contains no express reservation of a right of way is of no consequence.

Jamestown & Northern R. Co. v. Jones,
177 U. S. 125.
Smith v. Townsend, 148 U. S. 490.

THE ACT OPENING THE COEUR D'ALENE INDIAN RESERVATION IS NOT INCONSISTENT WITH OR REPUGNANT TO THE ACT UNDER WHICH APPELLEE'S RIGHT OF WAY WAS SECURED.

The Act of June 21, 1906, opening the Coeur d'Alene Indian reservation is not inconsistent with or repugnant to the Act of February 15, 1901. In

State v. Stoll, 17 Wallace, 425-431.

this principle is laid down:

> "It must appear that the later provision is certainly and clearly in hostility to the former.

> If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be."

And such also has been the view adopted in the construction of other statutes by the Land Department. The doctrine of the department is well stated by Secretary Noble in

In re Annie Knaggs, 9 L. D. 49

as follows:

> "Statutes are repealed by express provisions of a subsequent law, or by necessary implication, and in the latter case there must be such a positive repugnancy between the provisions of the old and new law that they cannot stand together, or be consistently reconciled. Repeals by implication are not favored in law, and are never allowed but in cases where inconsistency and repugnancy are plain and unaviodable, and it is a question of construction whether or not an act professing to repeal or interfere with the provisions of a former law operates as a total, or partial, or temporary repeal; and if there are two acts seemingly repugnant, if there is no clause of repeal in the latter, they shall, if possible, have such construction that the latter may not be a repeal of the former by implication."

REPLY TO CERTAIN ARGUMENTS IN APPELLANTS' BRIEF.

In appellants' brief at pages 36 to 38, it is argued that the appellee should be required to condemn the right of way for this existing line which was construct-

ed with the permission of the then owner of the land. It is argued that the appellee is a public service corporation and therefore has the power in Idaho to condemn lands necessary for its purposes.

On page 38, it is said that all the states in which permits for power transmission lines have been granted under the Act of February 15, 1901, confer upon such corporations the power to condemn lands necessary for their uses.

This would seem to be an argument of no importance in undertaking to interpret the intent of Congress in enacting the statute under consideration. A casual consideration convinces that the argument of appellants is without weight.

By the act under consideration, authority is given to the Secretary of the Interior to permit the use of rights of way, not only for such public uses as a power transmission line to be constructed by a public utility, but for private mining, timber or lumber uses. Many of the purposes for which rights of way may be granted under the act are private uses in at least some of the public land states, and uses for which lands cannot be condemned. In California, for instance, the owner of a gold mine sought to condemn a right of way for the purpose of constructing a ditch and flume to carry off the tailings from the mine. It was held not to be a public use.

Consolidated Channel Co. v. Central Pacific R. R. Co., 51 Cal. 269.

In

Amador Queen G. M. Co. v. De Witt, 73 Cal. 73 Cal. 482.

the plaintiff undertook to condemn a right of way through defendant's land for a mining tunnel. It was held to be not a public use.

In Idaho a different view is taken and the necessary use of lands for mining purposes may be acquired by condemnation. The act of congress, however, under consideration applies to all the public land states. It, of course, will receive a uniform construction, and it would seem that the question of whether or not the land might be condemned under state constitutions or laws should have nothing to do with the interpretation of the act. If, however, such consideration be of any importance, then the law is against appellants upon that question, for then appellants would take the land subject to the rights of way for public purposes then existing across it.

Roberts v. Northern Pacific R. Co., 158 U. S. 1.
Maffit v. Quine, 93 Fed. 347, 349.

In the *Roberts* case, this court held:

> "Damages to land by the construction of a railroad do not pass to a grantee of the land under a deed made subsequent to that time, unless expressly conveyed therein."

In *Maffit v. Quine,* a flume had been constructed upon land which at the date of its construction either was public land of the United States or belonged to the Northern Pacific Railway, under its grant. If it be-

longed to the railroad, it subsequently became public land.

After the construction of the flume, a homesteader settled upon the land and at a later date broke down and destroyed a portion of the flume where it passed across his land and prevented its use in the transportation of lumber from the plaintiff's mill to the point of shipping. The suit was brought by the owner of the flume to restrain the defendant in the commission of the acts complained of. In the course of the opinion, the court said:

> "Moreover, it is settled that where a company having the power of eminent domain has entered into possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such land, a subsequent vendee of the latter takes the land subject to the burden thus placed upon it; and the right to payment from the company, if it entered by virtue of an agreement to pay, or to damages if the entry was unauthorized, belongs to the owner at the time the company took possession. Roberts v. Railroad Co., 158 U. S. 1, 15 Sup. Ct. 756; Railroad Co. v. Murray, 31 C. C. A. 183, 87 Fed. 648. This doctrine applies in a case of this character. It may be questioned whether the company taking the right of way must have the power of condemnation; but, where such power exists, the established rule is that the owner at the time the possession was taken is entitled to the resulting damages where the entry was unauthorized, and that such damages cannot be recovered by the subsequent grantee of the premises. That a company like this has the right of condemnation is held in the case of Lumbering Co. v. Urquhart, 16 Or. 67, 19 Pac. 78."

The court also commented upon the fact that the defendant settled upon the land several years after the flume was constructed and in operation and had continued to reside there without making objection to it or complaint concerning it; that the damages suffered by him appeared to be merely nominal and his acts vexatious.

We respectfully submit that the decision appealed from should be affirmed.

Respectfully Submitted,

JOHN P. GRAY,

FRANK T. POST,

Counsel for Appellee.

APPENDIX I.

Department of the Interior,
Washington, August 23, 1912.

The Commissioner of the General Land Office.

Sir: Regulation concerning right of way over public lands and reservations for canals, ditches, and reservoirs, and use of right of way for various purposes approved June 6, 1908, embraced (pars. 37 to 45, inclusive) regulations under the act of February 15, 1901 (31 Stat., 790), entitled "An act relating to rights of way through certain parks, reservations, and other public lands."

This statute authorizes and empowers the Secretary of the Interior, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forests, and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, Cal.—

> for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed 50

feet on each side of the marginal limits thereof, or not to exceed 50 feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named.

The statute expressly provides—

> That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor, in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

Paragraph 43 of the regulations above referred to contained the following provision:

> The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the department, a revocation of the permission so far as it affects that tract.

By letter of May 7 to you, amending said paragraph 43, the provision last above quoted was omitted. Upon further consideration it is deemed advisable to further amend the regulations in this particular.

By the forest transfer act of February 1, 1905, section 1 (33 Stat., 628), the administration of the act of February 15, 1901, so far as it affects forest reservations was transferred to the Department of Agriculture. That department has never adopted that provision of the former regulations of this department last above quoted.

In view of the permanent character of the works authorized to be constructed under the act of February 15, 1901, and the large investment necessary to such construction the statute ought not to be interpreted as giving a precarious tenure except in so far as clearly appears from the words used by Congress. After careful consideration of the matter I am of the opinion that the intent of Congress was to protect the public by retaining in the hands of the Secretary of the Interior full control over water-power development through the device of making permits revocable in his discretion. The statute authorized, in more generous and comprehensive terms than had been used in any preceding statute, the development of water for domestic and public supply, irrigation, mining, and power, and also the development and transmission of electricity. Its primary purpose was to encourage development under unquestioned public control. The former regulation, which provided that—

> the final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission, so far as it affects that tract—

was directly contrary to the purpose of the statute as above interpreted. It discouraged development by making the title of the permittee subject, to that of the final patentee of the land occupied under the permit, and it abandoned all attempt at public control as soon as the land was finally disposed of.

To effectuate the purpose of the statute it is necessary that a permit once given should be superior to the rights of the subsequent patentee of the land until such time as the permit is duly revoked by the Secretary of the Interior in the exercise of the express authority given by the statute.

The contrary view, which was expressed in the provision of paragraph 43, above quoted, rests on a misleading analogy between these statutory permits and a license not coupled with an interest given by a private landowner to a stranger. But the rule of private real property law under which such a license is revoked by the transfer of the fee simple title has no application to either the legal or the economic data with which Congress was dealing in this legislation, and therefore the intent to enact the said rule should not be imputed to Congress in the absence of clear implication of such intent. It is, of course, unquestionable that it was entirely within the power of Congress to provide a different rule if in its judgment under the circumstances the public welfare required it.

In this connection, attention is called to the provision of the act of August 30, 1890 (26 Stat., 391), which reads as follows:

> In all patents for lands hereafter taken up under any of the land laws of the United States * * * * west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way therein for

ditches or canals constructed by the authority of the United States.

It is to be noted that this reservation was required by a statute passed more than 11 years before the statute under which these permits are issued, and that the words of the reservation are not limited to ditches and canals constructed by the United States, but are expressly extended to those constructed by "the authority" of the United States. This statute clearly shows that Congress, at a comparatively early date, realized the necessity of providing permanent reservations for ditches and canals. Doubtless the primary purpose in view was to safeguard the future construction of ditches and canals upon lands taken up before the construction should be authorized, by making all public lands thereafter taken up in the arid region subject to a public easement for that purpose whenever the Government should deem it wise to authorize such construction, as has since been done by the reclamation act of 1902; but it is clear that Congress realized and meant to provide against acquisition of adverse rights after construction which, though later in time, might otherwise be claimed to be prior in law to the ditch right. I am of the opinion that a ditch or canal constructed under permit issued under the act of February 15, 1901, is protected by the act of August 30, 1890, against any adverse claim set up by a subsequent patentee of the land traversed by the canal or ditch, and that this protection will continue at least until the Secretary

of the Interior shall revoke the permit which authorized the construction of the canal or ditch. Even after such revocation it is probable that the public right to issue another permit continues and is superior to the rights of the patentee.

As to the numerous other works for which right of way may be permitted under the broad and inclusive terms of the act of February 15, 1901, I am of the opinion that, in the absence of a regulation to the contrary issued under the broad authority given by the statute, the rights of the permittee continue after the issuance of patents to the lands affected and are superior to the rights of the patentees until such time as the Secretary shall exercise his discretionary power to revoke. It is, however, desirable that this construction of the statute shall be embodied in a regulation which can not be misunderstood. The regulations are therefore amended as follows:

At the end of paragraph 38 add the following words:

> The final disposal by the United States of any tract traversed by a right of way permitted under the said act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act.

It is also desirable that such patents should contain on their faces a notation of the prior permits and of all easements to which the lands are servient when the

patent issues. You will therefore be guided by the following regulation in the issuance of all patents:

> In every patent hereafter issued for a tract of land traversed by a right of way approved or permitted (including revocable permits) under any of the right of way laws and not forfeited or revoked before such issuance, such right of way or permit shall be expressly noted on the face of the patent by specific reference to the date when the statute under which the approval was made or permit issued. Such notation shall be in substantially the following form:
>
> Sec.———, T.——, R.——, is subject to all rights under an application by——, numbered——, and approved——, 19—, under the act of——, being an application for——.

It may be noted that the subject matter of the foregoing amendment is touched upon by two pending bills (S. 6440 and H. R. 19858). The department has expressed its views (by letter of May 2, 1912, to the chairman of the Senate Committee on Public Lands) on the Senate bill. The regulations hereinbefore made will protect permittees from any demands that might otherwise be made upon them by subsequent claimants of the lands over which the permits give a right of way. The rights of the public, however, are not fully protected, because private arrangements between such claimants, after they have obtained patent, and the permittees might give the permittees a perpetual right of way for any of the enumerated works (except a canal or ditch) free of the regulative power intended to be reserved to the Secretary of the Interior by said statute.

The public can be safe-guarded against this danger by withdrawal under the act of 1910 (36 Stat., 847) of all lands outside of national forests over which rights of way have hitherto or shall hereafter be permitted under the said statute by permits which remain unrevoked. The statutes relating to national forests reserve them from appropriation at the will of individuals, except under the mineral laws and certain of the right of way laws. The general withdrawal act of 1910 also subjects the withdrawn land to private appropriation under the mining laws, except as to coal, oil, gas, and phosphate. Lands within national forests servient to existing permits under the act of 1901 are therefore already protected from private appropriation in like manner, though not to like extent, as are those withdrawn under the act of 1910.

The withdrawals hereby ordered should be limited to the extent necessary to protect the works. In fixing this limit the department is not restricted to the designation of legal subdivisions or aliquot parts thereof. For example, withdrawal for a transmission line should include only a 100-foot strip.

You are hereby instructed to take up this matter with the Director of the Geological Survey with a view to your recommending jointly with him such withdrawals as are required by this letter.

Very respectfully,

WALTER L. FISHER, *Secretary.*